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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 1024

BOB JONES UNIVERSITY, INC., A CORPORATION,
Appellant,

v.

THE CITY OF GREENVILLE, SOUTH CAROLINA, A MUNICIPAL CORPORATION, GERALD W. SHAW, CITY MANAGER, AND JAMES H. WARD, BUILDING COMMISSIONER, OF SAID CITY, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION TO DISMISS

W. H. ARNOLD,
City Attorney of the City of Greenville,
Greenville, South Carolina,

CHARLES S. RHYNE,
BRICE W. RHYNE,
ALFRED J. TIGHE, JR.,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D. C.,
Attorneys for Appellees.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION TO DISMISS

Appellees, the City of Greenville, South Carolina, City Manager Shaw and City Building Commissioner Ward move that the appeal herein be dismissed on the ground that the appeal presents no substantial Federal question.

Question Presented

Is a property owner deprived of due process or equal protection of the law by the rezoning of neighboring property for the public good and general welfare of a city's residents according to a procedure admitted to be in ac-

cordance with a statute which procedure afforded Appellant an opportunity for a full and fair hearing?

Statement

This is an appeal from a decision by the Supreme Court of South Carolina [1] which upheld the validity of a zoning ordinance admitted by the Appellant to have been adopted in full accord with the procedural requirements of a state statute.

In addition, and for the first time, Appellant here attacks the system for the election and appointment of judges in South Carolina, the authority of the judiciary and the right of judges to hold office in South Carolina, and also the discharge by the General Assembly of the State of South Carolina of the duties prescribed by the Constitution and Laws of South Carolina.

The City of Greenville, pursuant to S. C. Code of Laws §§ 47-1001–47-1017, adopted a comprehensive zoning ordinance in 1952. By this ordinance the City was divided into different zones or districts. The property with which we are here concerned, known as the Wilson Property, was zoned A-1 Residential.

The Wilson property consists of approximately sixteen acres and is located on the southern side of Wade Hampton Boulevard, a four lane divided superhighway, known as U.S. Highway 29, between Greenville and Spartanburg, South Carolina. The property, as separated by a street approximately 50 feet in width, lies just west of Appellant's property fronting on Highway 29. On the other side of the Wilson property, also separated by a street 50 feet in width, is a recently constructed shopping center. Indeed,

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[1] *Bob Jones University, Inc.* v. *The City of Greenville, South Carolina, Gerald W. Shaw, City Manager, and James H. Ward, Building Commissioner,* —— S.C. ——, 133 S.E. 2d 843 (1963).

all of the property from Main Street in Greenville out along Highway 29, a distance of approximately one and one half miles, to the property in question on that side of the street is zoned for business. R. 171.[2] In addition, a supermarket is located on the Campus property owned by the Appellant (R. 37) and the plot immediately in front of Appellant's property across Highway 29 is likewise zoned for business. R. 62.

On December 4, 1961 the Wilsons applied to the Greenville City Council to rezone their property to an E-1, retail shopping center classification. R. 136.

Pursuant to the procedure established by state statute the zoning reclassification application was referred to the Planning and Zoning Commission. After due notice by advertisement, a joint public hearing was held by the Planning and Zoning Commission and the City Council. Appellant appeared by Counsel and was given an opportunity to be heard at this hearing. R. 42, 43, 50, 137.

The Greenville Planning and Zoning Commission, after the joint hearing, in a report to the City Council, unanimously recommended the zoning change. R. 43. The City Council then held a second public hearing at the first reading of the ordinance. This public hearing was in addition to the one required by the statute, and allowed proponents and opponents to be fully heard again. They were similarly afforded every opportunity to be heard at the second and third readings of the ordinance. R. 10, 43-45, 111, 137, 170.

Thereafter on July 10, 1962, the Greenville City Council in the manner provided by statute adopted the ordinance rezoning the Wilson property. P. 79.

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[2] References to pages of the Transcript of Record filed with the Supreme Court of South Carolina and certified to this Court are indicated by "R . . . ." Reference to the Jurisdictional Statement are indicated by "P . . . ."

This action was then filed for the purpose of having the ordinance declared null, void, and of no effect, and to enjoin the City, the City Manager and the City Building Commissioner from according the ordinance any validity and from issuing any building permits thereunder. R. 8.

The case, by agreement, and pursuant to statute (S. C. Code of Laws §10-1401-10-1416), was referred to the Master in Equity for Greenville County, with instructions to take testimony and report to the Court his findings of fact and conclusions of law. The Master, after three hearings during which voluminous testimony was taken, briefs filed, and many exhibits offered in evidence (R. 11-184), filed a report (R. 185-194) recommending that the complaint of Appellants be dismissed and the action of the Greenville City Council, rezoning the property in question from residential to business, be upheld in every respect. R. 192, 193. After Exceptions to the Report were filed by the Appellant (R. 194-204), the exceptions were overruled and the Report of the Master was confirmed and made the Judgment of the Court of Common Pleas for Greenville County. R. 205-209.

Substantially the same exceptions were presented to the Supreme Court of South Carolina, and that Court, in a comprehensive opinion, overruled all of the exceptions of the Appellant, affirmed the judgment of the Trial Court, and held:

(1) The City had the legislative authority to amend the general zoning ordinance.

(2) The City complied with all procedural requirements of the statute.

(3) The rezoning of the property in question merely expanded an existing commercial area.

(4) The record includes competent and substantial evidence to support the findings and conclusions of the Mas-

ter, concurred in by the Circuit Judge, that "the rezoning of the land in question is for the public good, the morals, and general welfare of the City of Greenville and its citizens," and that the Court has no right to substitute its judgment for the legislative body of the City of Greenville. P. 62.

ARGUMENT

No Substantial Federal Question Is Presented By This Appeal

1. *Zoning Ordinance Amendment Adopted Pursuant to State Statute After Legislative Hearing Is Not Violative Of Fourteenth Amendment.*

The law is well settled that zoning is constitutional as a valid exercise of the police power when reasonably related to the public health, safety, morals or general welfare. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365.

The regulation of the right to use and enjoy private property by a municipality within the scope of its authority and when reasonably related to the public health, safety, morals or general welfare has long been recognized. *Slaughter House Cases*, 16 Wall (U.S.) 36.

Sections 47-1001 to 47-1017 of the South Carolina Code of Laws authorize the zoning of property within a municipality for the purpose of promoting the health, safety, morals and general welfare of the community. Pursuant to this enabling legislation, a comprehensive zoning ordinance was adopted by the City of Greenville in 1952. The enabling legislation also authorizes municipalities to amend zoning boundaries upon notice after a public hearing at which parties in interest and citizens shall have an opportunity to be heard. (S. C. Code of Laws §47-1004, 47-1005). In addition, the statute provides that in case of a protest

to a proposed change signed by the owners of twenty per cent or more of specified properties, an amendment shall not become effective except by the favorable vote of three fourths of all members of the legislative body of the municipality.

The Supreme Court of South Carolina held in *Momeier* v. *John McAlister, Inc.*, 231 S.C. 526, 99 S.E. 177 (1957) that a municipality has the legislative power to amend its general zoning ordinance and rezone small areas, so long as its action is not arbitrary or unreasonable.

The procedure of the City in the enactment of the zoning change in this case conformed in every respect with State statutes and the ordinances of the City. R. 186.

Bob Jones University was given ample opportunity to present its views to the Planning and Zoning Commission and the City Council. R. 42, 43-45, 111, 137, 170. Indeed Appellant was afforded abundant due process having had four hearings. As stated by Mr. Justice Holmes:

> "Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule". *Bi-Metallic Invest. Co.* v. *State Board of Equalization*, 239 U.S. 441, 445.

In addition, though the written protests of residents and landowners within the area which would require a three fourths vote by the City Council, were not timely filed, (*Central Realty Corporation* v. *Allison*, 218 S.C. 435, 63 S.E. 2d 153 (1951)) Appellants were not prejudiced since on each reading of the amendatory ordinance more than three-fourths of the members of the City Council voted in favor of passage of the amendatory ordinance. R. 206.

Zoning regulations must be realistic and provide for the use and development of property according to present and future public needs. Changing circumstances, which render previously adopted regulations unrealistic and not promotive of intended purposes, must be served. As stated by this Court in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387:

> "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

A member of a class which is regulated may suffer economic losses not shared by others, and his property may lose utility and depreciate in value as a consequence of the regulation, but that has never been a barrier to the exercise of the police power. *Bowles* v. *Willingham*, 321 U.S. 503, 518.

If the validity of a legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328; see also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595. This rule was properly applied by the South Carolina Supreme Court in this case.

The appeal should therefore be dismissed for want of a substantial Federal question. *Lionshead Lake, Inc.* v. *Township of Wayne*, 344 U.S. 919; *Devereux Foundation, Inc.* v. *Lea*, 326 U.S. 686; *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388, 390; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328; *Nectow* v. *Cambridge*, 277 U.S. 183.

2. *The Zoning Ordinance Amendment Is Not Unreasonable Or Arbitrary*

Whether a zoning ordinance is reasonably related to police power considerations is a question of fact to be determined in light of existing conditions, such as the general character of the municipality and the neighborhoods affected, the uses to which nearby property has been put and the gain to the public as compared with the hardship imposed upon the individual property owners. *Euclid* v. *Ambler Realty Co.* 272 U.S. 365. Zoning ordinances are presumed to be constitutional and valid and to have been enacted upon adequate information and under the influence of correct motives. *Nectow* v. *Cambridge*, 277 U.S. 183,

187, 188; *Gorieb* v. *Fox*, 274 U.S. 603, 608; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328.

As stated by the Supreme Court of South Carolina:

> "Based upon the record, the Master concluded, 'The rezoning of the land in question is for the public good, the morals and the general welfare of the City of Greenville and its citizens', and that to deny the rezoning of the 'Wilson property' would be unreasonable, arbitrary, and not in conformity with the general principles of zoning and the rights of a property owner.' The Master also found that the area here involved has essentially changed and, as a result, the property in question should be rezoned, citing the fact that only recently there was a rezoning in order to allow the erection of a building for the First Federal Savings and Loan Association and for a filling station, both on the northern side of Wade Hampton Boulevard, and the shopping center designated as the Wade Hampton Shopping Center, immediately west of the property in question and on the southern side of Wade Hampton Boulevard." *Bob Jones University, Inc.* v. *City of Greenville, et al., supra.* P. 62

In concluding that the general welfare of the community would be advanced by reclassifying the property here in question from residential to commercial, the City Council had the benefit of the following:

(a) "Hoyt Report" and "Hamer Report", market surveys. R. 106, 111, 114-116.

(b) Testimony and exhibits presented by opponents and proponents *at four public hearings.* R. 42-45, 50, 111, 137, 170.

(c) Recommendation of the Greenville Planning and Zoning Commission. R. 43.

Governing bodies of municipalities clothed with authority to determine the reasonableness of residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts. Before legislation of this nature can be held unconstitutional and unwarranted, it must be found that it has no relationship to a public health, safety, convenience, comfort, prosperity, or general welfare and plainly is unreasonable and arbitrary. *Nectow* v. *Cambridge*, 277 U.S. 183, 187, 188; *Gorieb* v. *Fox*, 274 U.S. 603, 608; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328.

Debatable questions as to reasonableness are not for the Courts but for the legislature. An exercise of the police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595, 596.

The Supreme Court of South Carolina in its decision in this case stated (P. 64):

> "The Master has found, and such has been affirmed by the Circuit Judge, that the appellant has not sustained the burden of proof by showing that the action of the city council, in rezoning the property here in question, was arbitrary, unreasonable and unjust.
>
> "The Planning and Zoning Commission and the city council of Greenville concluded that the general welfare of the community would be advanced by reclassifying the property here in question from residential to commercial. The Master and the Circuit Judge likewise concur in such finding of fact. At the trial of the case before the Master, the appellant presented evidence which it contends shows that the rezoning of the Wilson property was arbitrary, unreasonable and an

abuse of discretion on the part of the city council. The respondents presented evidence to the contrary. The Master and the Circuit Judge have found that the action of the city council was not arbitrary, unreasonable and unjust. Under the factual findings so made, the most that can be said is that whether that determination was unreasonable, arbitrary and unjust is fairly debatable. If the validity of the classification made for zoning purposes be fairly debatable, and we think it is, the legislative judgment must be allowed to control. *Euclid* v. *Ambler Realty Company*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016."

3. *The Findings of the Master Were Made According to State Statute Which Provide a Fair and Reasonable Procedure.*

South Carolina law provides that issues in an action may be referred for hearing to a Master (S.C. Code of Laws §§ 10-1401-10-1416) and provides the procedure for such a hearing.

This case by agreement and pursuant to statute was referred to the Master in Equity for Greenville County.

Despite Appellant's objection to the Report of the Master (P. 6), the Supreme Court of South Carolina interpreting state procedural law and following precedent (*Cox* v. *First Provident Corporation*, 240 S.C. 130, 125 S.E. 2d 1 (1962) held that the procedure followed was fair and valid and that Appellant had not been prejudiced thereby. The Supreme Court of South Carolina stated:

"The appellant does not, by any of its exceptions, charge the Master with error in considering any testimony alleged to be incompetent or refusing to consider any testimony alleged to be competent. Neither does it specify in any exception or in its brief the particular

testimony which it contends to be irrelevant or incompetent and which it claims that the Master should not have considered but may have done so to its prejudice. Therefore, the appellant has not met the burden of establishing that it has been prejudiced by the Master's failure to expressly rule on objections to the evidence." P. 68

The South Carolina Supreme Court's decision interpreting South Carolina law is binding upon this Court and will not be reviewed or reversed. *Kersh Lake Drainage District* v. *Johnson*, 309 U.S. 485, 489; *Fisher* v. *Pace*, 336 U.S. 155, 162; *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 78, 79; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 500.

4. *Questions Presented For The First Time In This Court Are Raised Too Late*

Appellant in its Questions 8 through 12 (Jurisdictional Statement 7-9, 17-42) for the first time in this litigation, challenges the constitutionality of the authority exercised by the judiciary, the judicial system and the General Assembly of the State of South Carolina. This Court has long adhered to the rule that questions raised for the first time in appeal to this Court are raised too late.

"It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration." *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700. See also *Edelman* v. *California*, 344 U.S. 357, 358, 359.

Conclusion

For the foregoing reasons, the appeal should be dismissed or the decision of the South Carolina Supreme Court should be affirmed as no substantial federal question is presented herein.

Respectfully submitted,

W. H. Arnold,
City Attorney of the City of Greenville,
Greenville, South Carolina,

Charles S. Rhyne,
Brice W. Rhyne,
Alfred J. Tighe, Jr.,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D. C.,
Attorneys for Appellees.

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